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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 409.

TENNESSEE COAL, IRON AND RAILROAD COMPANY, ET AL.,
Petitioners,

v.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, ET AL.,
Respondents.

MOTION OF TENNESSEE COAL, IRON & RAILROAD COMPANY FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

NATHAN L. MILLER,
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Birmingham, Alabama.

Attorneys for Petitioner, Tennessee Coal, Iron & Railroad Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, ET AL.,
Respondents.

MOTION OF TENNESSEE COAL, IRON & RAILROAD COMPANY FOR LEAVE TO FILE PETITION FOR REHEARING OUT OF TIME.

Your petitioner, Tennessee Coal, Iron & Railroad Company, respectfully presents, this its motion, for leave to file the annexed petition for rehearing in this case out of time. In support of its motion petitioner presents the following:

On March 27, 1944, this Court rendered its decision in this case holding that travel time in underground iron ore mines should be included in the "work-day" or "work-week" for which compensation should be paid under the

Fair Labor Standards Act of June 25, 1938, Chap. 678, Sec. 152, Stat. 1060.

The time provided in Rule 33 of the rules of this Court for filing a petition for rehearing expired on April 21, 1944.

On or about May 6, 1944, there was filed in this Court and docketed as Case No. 969, October Term, 1943, a Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review the decision of the United States District Court for the Western District of Virginia (53 Fed. Supp. 935) in the case entitled *Jewell Ridge Coal Corporation* v. *Local No. 6167, United Mine Workers of America, et al.* That case held that travel time in underground coal mines should *not* be included in the "work-day" or "work-week" for which compensation should be paid under the Fair Labor Standards Act. Counsel for petitioner have only recently been advised of the filing of said writ of certiorari. In view of the importance of the question this Court should re-examine its decision in the present case.

Counsel for petitioner have likewise only recently learned that there is a general misunderstanding throughout the country as to the extent of the Court's decision in the present case, and that many claims for compensation are being made for travel time on the surface under a great variety of circumstances, which in the interest of justice and in the public interest warrants a re-examination of the present case by this Court. This is particularly true in view of the direct review of the Jewell Ridge Coal decision, Case No. 969.

This motion and the attached petition for rehearing have been prepared with due diligence since counsel for petitioner learned of the filing of the Petition for Writ of Certiorari in Case No. 969 above referred to.

WHEREFORE, your petitioner respectfully moves the Court for leave to file the annexed petition for rehearing out of time.

TENNESSEE COAL, IRON & RAILROAD COMPANY,

By NATHAN L. MILLER,
71 Broadway,
New York, New York.

ROGER M. BLOUGH,
436 Seventh Ave.,
Pittsburgh, Pa.

BORDEN BURR,
Birmingham, Alabama.

Attorneys for Petitioner.

CERTIFICATE.

I, Roger M. Blough, one of the attorneys for petitioner, do hereby certify that the facts stated in the foregoing Motion are true to the best of my knowledge.

.....

Dated: May 26, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 409.

TENNESSEE COAL, IRON AND RAILROAD COMPANY, ET AL.,
Petitioners,

v.

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, ET AL.,
Respondents.

PETITION OF TENNESSEE COAL, IRON & RAILROAD COMPANY FOR REHEARING.

Your petitioner, Tennessee Coal, Iron & Railroad Company, presents this its petition for a rehearing in the above entitled case and respectfully alleges:

1. The majority of the Court erroneously assumed that the question for decision was whether a particular exertion, mental or physical, constituted work or employment within the meaning of the statute and was therefore a question of fact, whereas the term of the statute to be construed was "work-week".

2. The majority of the Court overlooked or misapprehended the significance of the fact of common knowledge that the customs and practices of different industries at the time of the passage of the Act varied widely as to what should be included in the "work-day" or "work-week" for which compensation should be paid and that some state legislatures have provided that all travel time in underground mines should be included, but some have provided that only the time at the actual working places should be included and that one at least has provided for the inclusion of travel time one way.

3. The majority of the Court overlooked or disregarded the fact that the term "work-week" as used in the Act of Congress in respect of underground mining had been construed for twenty years by all concerned, the United Mine Workers, the Lessees, and the public officials charged wtih the duty of enforcement as not including travel time and that no question had ever been raised by anybody over such construction.

4. The majority of the Court erroneously held that the question for decision was one of fact to be decided in each case as the individual judge or trier of fact should determine.

5. The majority of the Court overlooked or disregarded the fact that the District Court did not find whether it had ever been the custom, practice or agreement of the petitioner to compensate its employees in its underground iron ore mines for travel time and the evidence is that by invariable practice, custom or agreement such employees were never compensated for travel time prior to the passage of the Act.

6. The majority of the Court overlooked or disregarded the fact that as was stated by the Solicitor General in the oral argument of the present case, the portal-to-portal method had not been prevailing in any iron ore or bitumi-

nous coal mine anywhere in the United States except in the two states where statutes required it.

7. The majority of the Court erroneously held that the findings of the District Court were relevant to the question of the intention of Congress in the enactment of the statute.

8. The majority of the Court overlooked or disregarded the fact that the real question for decision was whether in prescribing a forty-hour "work-week" for all industry without defining the term "work-week" the Congress intended to invalidate agreements fairly arrived at by the process of collective bargaining or in established customs and standards of particular industries.

9. The majority of the Court erroneously held that contract and custom were immaterial.

10. The majority of the Court overlooked or disregarded the effect of the Court's decisions in *William* v. *Jacksonville Terminal Co.*, 315 U. S. 386, and *Walling* v. *Belo Corporation*, 316 U. S. 624.

WHEREFORE, petitioner respectfully prays that this Court enter an order granting this petition for rehearing.

Respectfully submtited,

TENNESSEE COAL, IRON & RAILROAD COMPANY,

By NATHAN L. MILLER,
71 Broadway,
New York, New York.

ROGER M. BLOUGH,
436 Seventh Ave.,
Pittsburgh, Pa.

BORDEN BURR,
Birmingham, Alabama.

Attorneys for Petitioner.

CERTIFICATE OF COUNSEL.

I, Roger M. Blough, one of the attorneys for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Dated: May 26, 1944.